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ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1984

TEXACO, INC., ET AL.,

Petitioner

V.

TILDEN DAVID NESMITH,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether there has been any compliance with the mandate of Rule 52(a) of the Federal Rules of Civil Procedure, requiring that the District Court enter special Findings of Fact and separate Conclusions of Law in negligence cases, inasmuch as the District Court has made no such Findings on the liability issue.

II. Has the utter failure by both the District Court and the Court of Appeals to articulate the standard of care applicable to this 905(b) case, and then to demonstrate that there was a deviation from that standard, occasioned a result which cannot be sanctioned?

III. Has petitioner been deprived of meaningful review of the liability assessments by the failure of both the District Court and the Court of Appeals to delineate the duty owed to a longshoreman in a Section 905(b) case?

IV. Whether, under 905(b), a shipowner must have actual knowledge of an open and obvious danger before being held to a duty to initiate corrective action.

**LIST OF PARTIES AND CORPORATE
PARTY'S AFFILIATIONS**

The only other parties to the lawsuit not listed in the caption of the Petition are Pool Offshore Company, co-defendant with petitioner, and Employers National Insurance Company, intervenor.

Petitioner is a wholly-owned subsidiary of Tidewater Inc., and, apart from its several wholly-owned subsidiaries, does not otherwise have any parent companies, subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI

WITH RESPECT, Tidex, Inc. petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in order to review the Opinion and Judgment rendered in this cause.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at __ F.2d __ (5th Cir. 1984) (Appendix A). The Opinion of the United States District Court for the Western District of Louisiana is reported at 491 F.Supp. 561 (D.C. La. 1980). (Appendix E)

The reported Opinion of the District Court confines

itself to the issue of quantum. The liability issues in the case were decided by the Court immediately upon the close of the presentation of evidence. However, the District Court never entered specific Findings of Fact and Conclusions of Law; excerpts of the District Judge's comments at the conclusion of the trial have been reproduced as Appendix B of this Petition.

JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals was entered March 23, 1984 (Appendix C). A timely filed Petition for Rehearing was denied April 20, 1984 (Appendix D). Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C.A. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Civil Procedure 52(a) provides, in pertinent part, as follows:

In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its Conclusions of Law thereon. ...Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witness.

2. Section 905(b) of the Longshoreman and Harbor Workers' Compensation Act (33 U.S.C.A. 901 *et seq.*) provides as follows:

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise

entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

3. Section 1333(b) of the Outer Continental Shelf Lands Act (43 U.S.C.A. Section 1331 *et seq.*) invokes the provisions of the Longshoremen's and Harbor Workers' Compensation Act with respect to personal injury claims in the following provision:

(b) With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer continental shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. Section 901 *et seq.*).

STATEMENT OF THE CASE

Tilden Nesmith was seriously injured when he fell out of a personnel basket that had been lifted by crane from the deck of a Tidex supply vessel for transfer to a fixed

platform located on the outer continental shelf offshore Louisiana. The crane from which the personnel basket was suspended was situated on the platform, and was operated by an employee of Pool Offshore Company.

The accident occurred because the Pool crane operator lifted the personnel basket from the vessel deck at the wrong moment, when the boom of the crane was misaligned with the vessel below, causing the basket to carom off of the port and starboard stacks of the boat, throwing Nesmith to the deck.

The case was tried to the Court, sitting without a jury. At the close of the presentation of evidence, the District Judge orally ruled on the liability issue, finding Pool sixty percent at fault, and Tidex forty percent responsible for Nesmith's injury. The District Court entered neither oral nor written subsidiary Findings of Fact in support of the finding of negligence against Tidex.

Tidex appealed the case to the Fifth Circuit Court of Appeals, where it remained for almost four years.

During that four year interim, this Court decided *Scindia Steam Navigation Company v. de Los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1981), and carefully articulated the standard of care and scope of duty owed by a vessel owner to a longshoreman like Nesmith. Despite the fact that the Opinion by the Fifth Circuit Court of Appeals in the case at bar was rendered almost three years after *Scindia*, the Court, without any discussion whatsoever, summarily affirmed the District Court's unsupported finding of liability against Tidex.

Tidex petitioned for a rehearing, pointing out once

again that under the specific mandates of Rule 52(a) of the Federal Rules of Civil Procedure, it was clearly entitled to a remand of the case for, at a minimum, an articulation of subsidiary factual findings upon which the liability assessment was based.

Secondly, under *Scindia*, Tidex contended that it was entitled, as a matter of law, to rely upon the crane operator to perform the personnel transfer in a safe and competent manner, and correlatively, that the Tidex captain had no duty to supervise—and in fact could not have supervised—the Pool employee in the discharge of his duties at the controls of the crane.

Finally, a review of the Trial Court comments at the close of the case imparts the notion that the Judgment against Tidex could only have been based upon the breach of a duty of the Tidex captain to intervene to correct an open and obvious danger created by the misalignment of the boom of the crane, even though the captain had absolutely *no knowledge* of that situation. Under *Scindia*, it is clear that with respect to open and obvious dangers, one must prove that the Tidex captain had *actual knowledge* of the dangerous condition in order to predicate liability upon a vessel, clearly not accomplished in this case. *Scindia, supra; Helaire v. Mobile Oil Company*, 709 F.2d 1031 (5th Cir. 1983).

The Petition for Rehearing was denied by the Court, without any assignment of reasons.

Tidex now applies to this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S "FINDINGS" AND THE SUBSEQUENT APPELLATE APPROVAL THEREOF FALL SO SHORT OF ACCEPTABLE JUDICIAL PROCEDURE AS TO COMPEL SUPERVISORY REVIEW BY THIS COURT.

The scope of review of Federal Appellate Courts is limited by Federal Rule of Civil Procedure 52(a), which provides that findings of a Trial Court are not to be disturbed unless clearly erroneous. Meaningful and proper appellate review is insured because the Trial Court is required by the same rule to specially find the facts and to state separately its Conclusions of Law thereon. The District Court in the instant case completely neglected, in the first instance, to specify any underlying facts in support of its ultimate conclusions, and thereby deprived the Fifth Circuit Court of the tools essential to proper appellate evaluation. The unmistakable conclusion is that the Fifth Circuit usurped the fact finding role of the lower Court in order to reach its decision, in clear violation of Federal Rule of Civil Procedure 52(a).

An ultimate finding of negligence is considered a factual finding which cannot be disturbed unless clearly erroneous. *McAllister v. United States of America*, 348 U.S. 19, 75 S.Ct. 348 (1954). However, the clear requirements of Rule 52(a) necessitate that the Trial Court include with its ultimate factual findings those subsidiary facts sufficient to indicate the factual basis for its ultimate conclusion. *Kelly v. Everglades Drainage Dist.*, 319 U.S. 415, 63 S.Ct. 1141 (1943). *Denofre v. Transportation Insurance Rating Bureau*, 532 F.2d 43 (7th Cir. 1976). The Trial Court's

burden is no less onerous in negligence cases. *Dalehite v. U.S.*, 346 U.S. 15, 73 S.Ct. 956 (1953).

The Trial Judge at the District Level utterly failed in the obligation to carefully sift the evidence, and to state with precision and certainty just what facts were proved by a preponderance of the evidence in reaching the ultimate conclusion that Tidex was negligent. *U.S. v. Mertz*, 376 U.S. 192, 84 S.Ct. 639 (1964). *Golf City v. Wilson Sporting Goods Company*, 555 F.2d 426 (5th Cir. 1977).

In order to properly review the Judgment, the Fifth Circuit was charged by Rule 52(a) to first remand the case to the Trial Court for an articulation by it, as finder of fact, of the most basic subsidiary facts upon which it relied in reaching its determination. The Fifth Circuit's summary affirmation of the Trial Court's decision gives no indication that proper appellate review was conducted.

With all due deference to the District Judge and the Fifth Circuit panel, the Opinions and Judgments of the District and Appellate Courts so clearly violate the letter and the spirit of Rule 52(a) as to justify a Writ of Certiorari to the Fifth Circuit Court of Appeals from this Honorable Court in the exercise of its supervisory power.

II. THE FIFTH CIRCUIT FAILED TO APPLY THE PROPER STANDARD OF CARE IN ITS DETERMINATION OF VESSEL NEGLIGENCE, IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Although it is difficult to know what standard of care was applied, the Courts below could not have arrived at a determination of vessel negligence without deviating from

the principles set forth by this Court in *Scindia Steam Navigation v. de Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

In *Scindia*, the Court clearly stated that once stevedoring operations have begun, the vessel operator has no duty to inspect or to supervise the stevedore in the discharge of his duties, but may rely upon him to avoid exposing longshoremen to unreasonable hazards, and to perform his work in a safe and competent manner. The shipowner further cannot be held responsible to discover dangerous conditions which develop within the confines of the operations assigned to the stevedore. *Scindia, supra*.

The Trial Court found that the Pool company operator had exclusive control over the actual lift of the personnel basket. Under the principles espoused in *Scindia*, the Tidex captain was entitled to rely upon the crane operator to judge the angle of the boom and the timing of the lift accurately, and to lift the basket at a safe moment. The Tidex captain had no duty to supervise the Pool employee at the controls of the crane, or to ensure that he was paying attention to the job at hand. The lower Court decisions, to the extent each burdens Tidex, the vessel owner, with responsibility for the negligence of the Pool employee, clearly conflict with long standing decisions of this Court. *Scindia; Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514 (1971).

Scindia also established that the vessel owner can only be responsible for injuries to the stevedore caused by open and obvious dangers which develop during the course of the stevedoring operations, if the vessel had *actual knowledge* of such danger, as well as actual knowledge that it cannot rely upon the stevedore to correct such danger. *Scindia; Helaire, supra*.

The uncontroverted evidence at trial repeatedly demonstrated that the Tidex captain had no view of the line, no view of the boom, and no knowledge of the dangerous condition created by the angle of the boom immediately prior to the lift, although such danger was readily ascertainable by the crane operator. Under *Scindia*, then, the captain's utter lack of knowledge of this danger insulates Tidex from liability toward Nesmith.

Neither the Trial Court nor the Appellate Court once articulated the standard of care by which the conduct of Tidex toward Nesmith was measured. Because a careful scrutiny of the facts unquestionably shows that the conduct of the vessel was not, in any event, measured against the standard of care established by the *Scindia* guidelines, the decisions of the lower Courts are in direct conflict with that decision, which justifies a Writ of Certiorari by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be granted. The record stands in this Honorable Court of last resort, with an assessment of liability against a defendant that was initially made without any regard for the requirements of Federal Rule of Civil Procedure 52(a). The resulting injustice has been propagated by a four-year hiatus in the Court of Appeals, where regrettably and unjustly there remains no articulation whatsoever of the factual or legal basis underlying the liability judgment with which Tidex has been cast. There has yet to be set forth either a standard or a duty which is alleged to have been violated or breached by Tidex. It is virtually inconceivable that a case can be reviewed by the appropriate authorities at every

stratum of the judicial process without having had even the most fundamental standards developed, analyzed and articulated by the arbiters of justice. And yet, that is exactly what is presented here, with Tidex standing cast for a portion of a one-half million dollar judgment without ever having been accorded the factual backdrop for its liability.

Accordingly, for the foregoing reasons, Tidex prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing brief have been forwarded to opposing counsel by depositing same in the United States mail, postage prepaid on this 19th day of July, 1984.

Cliffe E. Laborde, III



A-1

APPENDIX "A"

Tilden David NESMITH,

Plaintiff-Appellee,

v.

TEXACO, INC., et al,

Defendants,

Pool Offshore Company,

Defendant-Appellee,

v.

Tidex, Inc.,

Defendant-Appellant.

No. 80-3668.

**United States Court of Appeals,
Fifth Circuit.**

March 23, 1984.

Oil platform worker, injured while being transferred by personnel basket from vessel to platform, sued owner of vessel, owner of platform and company which operated the platform. The United States District Court for the District of Louisiana at Lafayette, Richard J. Putnam, Senior District Judge, calculated damages award for plaintiff, 491 F.Supp. 561. One defendant appealed. The Court of Appeals held that proper approach to calculation of plaintiff's damages award was not to apply inflation factor, but,

rather, to estimate wage increases which plaintiff would have received each year as result of individual and societal factors, excepting price inflation, e.g., personal merit and experience, and then to discount resulting income stream by below-market discount rate.

Affirmed in part; vacated in part and remanded.

Appeal from the United States District Court for the Western District of Louisiana.

Before REAVLEY and JOHNSON,¹ Circuit Judges.

PER CURIAM:

We delayed consideration of this case pending decision *en banc* of *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir.1981). Following the *en banc* decision in *Culver*, 688 F.2d 280 (5th Cir.1982) (*en banc*) (*Culver I*), the Supreme Court decided *Jones & Laughlin Steel Corp. v. Pfeifer*, __ U.S. __, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). Prompted by the *Pfeifer* opinion, this Court reconsidered *Culver I* on petition for rehearing. *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir.1983) (*en banc*) (*Culver II*). In light of *Culver II* this Court vacates the damage award and remands for reassessment of damages. In calculating plaintiff's award, the district court applied a 6% inflation factor² and an 8%

¹ The third member of the panel hearing this case was Chief Judge JAMES P. COLEMAN who has since retired from the Court. Accordingly the instant case is decided by a majority of the panel.

² The court estimated that plaintiff's annual lost wages equalled \$24,600 in 1980 dollars and then assumed a 6% inflation rate so that his annual lost wages at the end of his work life in 2013 amounted to \$150,000. After discounting, the court applied a 15% rate to adjust the award for income taxes.

discount rate to plaintiff's estimated lost earnings. The *en banc* Court in *Culver II* opted for the below-market-discount method. This approach does not allow for consideration of inflationary factors when calculating plaintiff's lost stream of future earnings. Instead, the trier of fact estimates the wage increases the plaintiff would have received each year as a result of individual and societal factors (excepting price inflation), e.g., personal merit and experience. The resulting income stream is then discounted by a below-market discount rate.

On remand the district court, 491 F.Supp. 561, may hear any further evidence it deems necessary pursuant to *Culver II* in order to recalculate plaintiff's damage award. The court is directed to apply the principles of *Culver II* in adopting the appropriate discount rate. The remainder of the appeal presents no issues requiring written disposition. Accordingly, the judgment of liability against the defendants is affirmed.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

APPENDIX "B"

COURT: Let's take a five-minute recess.

RECESS

COURT: Gentlemen, let me say this. I can decide the case now on the issue of liability, so you can prepare your argument.

I would like to hear argument on the question of quantum. I believe that there is only one way to find the facts in this case from the evidence that I've heard, and that is that the witnesses who testified positively as to what occurred and are in a position to remember more accurately what occurred are those who the Court must afford greater credibility, in spite of the fact that one of them is the plaintiff in the case and the other one was his co-worker at the tiem.

The plaintiff is, not only that he's corroborated in his version of the incident to some extent by one of the Pool hands—I believe it was the driller—who said he saw a man fall off the basket when it was about two feet off the floor. There are conflicting details; of course, you can't resolve all conflicts in the testimony, it's impossible. But the Court finds that the evidence does preponderate in favor of the plaintiff in this case and that the accident in the case was due to fault on the part of Tidex, boat operator, and on the part of Pool, the crane operator, and I would apportion that fault in the proportions of forty percent to Tidex and sixty percent to Pool, in view of the fact that the Pool crane operator had the final decision to raise or abort the lifting of the personnel basket at that time. And the further fact that the crane operator had a better view of the line going

down to the boat, and was better able to see and tell whether or not that line was at an angle than did the skipper. It's not easy to hold a boat in position with four to six foot seas, but a vessel the size of the JEWEL TIDE, which I believe was around a hundred and sixty or a hundred eighty feet long, would not be affected to any great extent by a four to six foot swell. This vessel is as long as a PC boat, which we used extensively during World War II, and possibly a little more shallow in draft and broader in beam than a PC. It should be more stable than a PC boat, and I'm sure it was. it's a different type craft, built for different purposes, and should have more stability in the water.

However, you can't keep a boat of any size not moving at all, it's very difficult. You have currents in the Gulf, and you have winds. All of these factors come into play. Anything could cause this boat to move two to three feet one way or the other in a period of five minutes. Anyone who can hold a boat exactly stationary in the Gulf of Mexico with the tide running, either one way or the other, whether you are fifty miles out or a hundred miles out, you're going to have currents in the Gulf, and the boat is going to be set down with the current and it will also drift with the wind. You're going to have that and so it's very difficult. Anyone who can hold a boat with a thirty knot wind and a four to six foot sea running, even a boat the size of the JEWEL TIDE, has got to be a pretty doggoned good seaman and shiphandler. I want to tell you that, if he can hold it without moving, in place. Now, the crane operator knows this, this is a fact of life; this is something that nobody can rationally dispute. Unless you come in and tie up and secure your vessel, and wait for your lines to become taut, then to hold a boat in place, using the engines, is going to be a remarkable feat, under the conditions here.

Now, it doesn't mean that it's negligent or unsafe to come in and attempt to unload in the fashion that the captain of the JEWEL TIDE did on this occasion. The captain of the vessel is responsible for the unloading of the personnel from the vessel to the platform, as is the platform operator—the man who is operating that crane. There is a joint responsibility. Either one should readily and quickly abort the unloading operations if any indication appears to either one of them that it might not be safe. Here, the crane operator, obviously sitting in a unit crane—and I'm going to find that the Texaco crane was the crane that was used—in the cab of the unit crane had a view of his line and had a view of his boom; he had a view of the vessel; he had a view of the deck; he had a view of his deadman hanging from the end of the crane, and if he had been keeping a proper lookout and exercising proper care for the safety of the people who were exposed to the hazards of his operation, he would have seen that that line had to be at some angle so as to cause that basket to swing as it did when he lifted. The fact that he did not see any accident, he did not see a man fall off of the basket—and his testimony was very vague on this point, his remembrance of this particular night was not clear—but his testimony was very positive that he never saw anybody ever fall off of a basket that he was lifting at any time since he's been operating as a crane operator in the Gulf. So apparently he was not giving the same attention to what he was doing as was the driller on his crew, who did see the man fall, and testified that he saw him fall on this occasion.

So I've got to go with the proposition that the accident happened; that the plaintiff and Mr. Goode were in a better position to say how it happened, give more of the details of it, and therefore I find liability on the part of Pool, the negligence of the crane operator, and on the part

of Tidex, the negligence of the captain of the vessel in not, themselves, seeing the unsafe position of the line and aborting the mission themselves. He testified that he could see the aft portion of his deck and that he was in possession of all of his faculties that night; that he saw the operation take place and that he did not see any accident. I don't know where he was looking when this accident occurred, either. It's possible that the crane operator and Captain Viator had some other unloading operation in mind. These things are very day occurrences; they happen frequently. Loading and unloading of personnel from platforms in the Gulf, it is continuous and it is extremely difficult unless a man's attention is directed to a particular incident at the time so as to impress it on his memory. It is difficult for him to thereafter, two to three years later, recall the details of every unloading operations, and it's very easily possible that they can confuse these operations.

I don't impute perjury to either one of these gentlemen. I think Captain Viator is a capable boat skipper. He was on this JEWEL TIDE, I think, only one time. He should have known that his vessel had drifted, or that the boom in the crane had been shifted prior to the lift. I don't believe that the lift was done in such a fashion that the boom was swinging before the basket cleared the vessel, I don't think that that's what happened. I think that the lift was commenced with the line at an angle and when the basket lifted, it swung. And it was lifted rapidly, and it swung rapidly, and it hit this stack and then it swung over toward the other side of the vessel as it had to.

So gentlemen, that is my finding on liability, and that's the apportionment I'm going to ascribe to the parties in this case—sixty percent to the platform, Pool, and forty percent to Tidex, the vessel.

I will repeat, people who are being offloaded from vessels, or loaded onto vessels, are completely helpless; they have no control over the operation whatsoever. The two people in control are the boat operator and the crane operator; they operate instrumentalities that can cause, if improperly used in the slightest degree, serious and lasting bodily harm and injury to those who are more or less at the mercy of these two people: the boat operator and the crane operator. This is particularly true in offloading personnel from a boat to a platform.

So I would like to hear arguments, gentlemen, on quantum.

By the way, insofar as Texaco is concerned, there's not one scintilla of.....

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APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3668

D.C. Docket No. CI-79-0197-D

TILDEN DAVID NESMITH,

Plaintiff-Appellee,

versus

TEXACO, INC., ET AL.,

Defendants,

POOL OFFSHORE COMPANY,

Defendant-Appellee,

TIDEX, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana

Before REAVLEY and JOHNSON,¹ Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

¹ The third member of the panel hearing this case was Chief Judge James P. Coleman who has since retired from the Court. Accordingly the instant case is decided by a majority of the panel.

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ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District court in this cause be, and the same is hereby, affirmed in part; vacated in part; and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that costs are taxed equally against defendant-appellee and defendant-appellant.

March 23, 1984

ISSUED AS MANDATE: JUL 3 1984

A-11

Tilden David NESMITH,

Plaintiff-Appellee,

v.

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Defendants,

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rather, to estimate wage increases which plaintiff would have received each year as result of individual and societal factors, excepting price inflation, e.g., personal merit and experience, and then to discount resulting income stream by below-market discount rate.

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¹ The third member of the panel hearing this case was Chief Judge JAMES P. COLEMAN who has since retired from the Court. Accordingly the instant case is decided by a majority of the panel.

² The court estimated that plaintiff's annual lost wages equalled \$24,600 in 1980 dollars and then assumed a 6% inflation rate so that his annual lost wages at the end of his work life in 2013 amounted to \$150,000. After discounting, the court applied a 15% rate to adjust the award for income taxes.

discount rate to plaintiff's estimated lost earnings. The *en banc* Court in *Culver II* opted for the below-market-discount method. This approach does not allow for consideration of inflationary factors when calculating plaintiff's lost stream of future earnings. Instead, the trier of fact estimates the wage increases the plaintiff would have received each year as a result of individual and societal factors (excepting price inflation), e.g., personal merit and experience. The resulting income stream is then discounted by a below-market discount rate.

On remand the district court, 491 F.Supp. 561, may hear any further evidence it deems necessary pursuant to *Culver II* in order to recalculate plaintiff's damage award. The court is directed to apply the principles of *Culver II* in adopting the appropriate discount rate. The remainder of the appeal presents no issues requiring written disposition. Accordingly, the judgment of liability against the defendants is affirmed.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

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APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3668

TILDEN DAVID NESMITH,

Plaintiff-Appellee,

versus

TEXACO, INC., ET AL.,

Defendant,

POOL OFFSHORE COMPANY,

Defendant-Appellee,

TIDEX, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING
(Filed April 25, 1984)

Before REAVLEY and JOHNSON,¹ Circuit Judges.

¹ The third member of the panel hearing this case was Chief Judge James P. Coleman who has since retired from the Court. Accordingly the instant case is decided by a majority of the panel.

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PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/S/ Signed

United States Circuit Judge

APPENDIX "E"

Tilden David NESMITH,

v.

TEXACO, INC., et al,

United States District Court,
W.D. Louisiana.

June 18, 1980.

Oil platform worker, who was injured while being transferred by personnel basket from a vessel to the platform, sued the owner of the vessel, the owner of the platform and the company which operated the platform. After finding for the worker on the issue of liability, the District Court, Putnam, Senior Judge, held that: (1) the evidence established that the worker, who sustained a 30 percent permanent disability from a back injury, was entitled to an award of \$481,271.10, and (2) the worker was not entitled to an award of prejudgment interest.

Judgment for plaintiff.

Domengeaux & Wright, Bob F. Wright, Lafayette,
La. for plaintiff.

Laborde & Lafargue, C. E. Laborde, III, Marksville,
La., for Tidex.

Jones, Walker, Waechter, Poitevent, Carrere &
Walker, John R. Peters, Jr. and Anthony M. Fazzio,
Lafayette, La., for Texaco, Inc.

Johnson & McAlpine, Michael McAlpine, New Orleans, La., for Pool Offshore.

Lemle, Kelleher, Kohlmeyer & Matthews, Douglas P. Matthews, New Orleans, La., for intervenor.

OPINION

PUTNAM, Senior District Judge.

Having decided the question of liability in favor of the plaintiff at the conclusion of the evidence, we called for briefs on quantum and whether or not the case was appropriate for prejudgment interest.

Briefly stated, David Nesmith, plaintiff, an employee of Go Wireline Services, a division of Gearhart-Owens Industries, Inc., was injured while being transferred by personnel basket from a vessel owned and operated by Tidex, Inc., to a platform owned by Texaco, Inc., on which Pool Offshore Company had contracted to drill a well in search of oil, gas and other minerals on the outer continental shelf off the Louisiana coast.

Defendant Texaco, found blameless, was dismissed from the suit. Defendants Tidex and Pool were found jointly negligent and cast as joint tort-feasors in the proportions of 40% to Tidex and 60% to Pool.

Plaintiff was 28.77 years of age on March 4, 1978, when the accident occurred. We will treat his age as 29 for purposes of this opinion; at time of trial—two years, one month, and ten days later—he was 31, with a life expectancy of 41.5 years and 31.3 years remaining as a member of the “labor force”.

Nesmith fell from a swinging personnel basket that struck one of the stacks of the vessel "JEWELL TIDE", landing on the steel deck of that vessel and injuring his back. He did not consider his injuries serious, but continued to work; however, increasing discomfort prompted him to seek medical advice two months later from Dr. Richard LeBlanc of New Iberia, Louisiana. He was treated conservatively, but, in July, 1978, Dr. LeBlanc determined that he had sustained ruptured discs at the L-4, L-5 level in the lumbar spine. A laminectomy was performed and eventually plaintiff was discharged with a 30% disability that is expected to be permanent. The results of the operation are classified as excellent by all of the physicians who have seen him.

Among other things, plaintiff cannot do any heavy work, which effectively precludes his former occupation with Go Wireline Services as a sales and freepoint operator, or any other heavy work in the "oil patch", and his everyday physical activities are now and will necessarily be curtailed for the rest of his life. He will suffer discomfort in his low back from time to time in the future in varying degrees, depending upon his activity. He is now attending Crawford Rehabilitation Service in Baton Rouge, but at the time of trial no evaluation of his remaining potential had been made. Dr. LeBlanc, his treating physician, stated that the pain he continues to experience in his leg will eventually subside. All doctors recommend against repetitive stooping and/or bending. Other than these things, Dr. LeBlanc opined there was no reason why plaintiff could not lead a normal life.

On the plus side of the ledger, Nesmith is a young and apparently bright person. He obtained a high school equivalency while in the service, and has considered

attending college since this accident. He is certainly capable of minimizing future damages by working and earning at the least the prevailing minimum wage. In fact, while the record is barren of proof on this score, the court feels strongly that Mr. Nesmith will lead a highly productive and rewarding life in the future, and that he will not be relegated to sedentary work or to any other position at the minimum wage level. But the court is not now nor have we ever been given to speculation for the purpose of enhancing or diminishing an award of damages for personal injuries. The fact that he will earn at least the prevailing minimum wage was admitted by him and brought out in the evidence at the trial by his expert economist as we shall see hereinafter.

The rule in this Circuit as to damages has only recently been firmly established by the case of *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5 Cir. 1975), cert. den. 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58. That case held that in determining an award for future loss of earnings due to personal injury we should (a) use gross income, before taxes, as a basis for the award, (b) consider only such increases in pay as plaintiff would have earned as merit increases, as opposed to cost of living or inflationary raises, (c) make no allowance or deduction for future income taxes and (d) discount the award over the work life expectancy of the claimant so as to arrive at its present value using the current rate of interest for reasonably safe long-term investments available to the average person at the place of trial. The teachings of *Johnson* are premised upon the proposition that future taxes, inflationary cost of living pay raises, and fluctuating interest rates are too speculative to provide a firm foundation for fixing a reasonable and fair present value for a future loss accruing over a protracted period of time.¹

¹ *Penrod, supra*, was brought under the Jones Act, 46 U.S.C.A. §

On February 19, 1980, however, in *Norfolk & Western Railway Co. v. Liepelt, Administratrix, etc.*, — U.S. —, 100 S.Ct. 755, 62 L.Ed.2d 689, the Supreme Court held that it was error for the trial judge to refuse to instruct the jury that “your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award.”² In so doing, the court rejected out of hand the proposition that the gross income of the decedent should be used to determine future pecuniary losses of his widow and dependents at his death. The Court said:

“It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner’s income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.”

“Admittedly there are many variables that may affect the amount of a wage earner’s future income tax liability. The law may change, his family may increase or decrease in size, his spouse’s earning may affect his tax bracket, and extra income or unforeseen deductions may become available. *But future employment itself, future health, future personal expenditures, future interest*

(Footnote 1 continued)

688, which makes the provisions of the Federal Employers Liability Act, 45 U.S.C.A. § 51 et seq., applicable to seamen, for personal injuries sustained by the plaintiff. The wisdom of the rule announced in this case is apparent from present economic trends, fluctuating interest rates and general economic malaise.

² *Liepelt, supra*, involved an action for death brought by the widow of a railroad employee for per pecuniary losses. The suit was brought under the FELA, 45 U.S.C.A. 51 et seq., which applies to seamen, n. 1, *supra*.

rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's after tax earnings is too speculative or complex for a jury." (Emphasis supplied.)

In view of the specific holding in *Liepelt, supra*, as to the effect of income taxes on the support or pecuniary benefit derived from a person's labor, and the broad language quoted above, it now appears that in arriving at an award for future loss of earnings the very factors disapproved in *Johnson, supra*, should now be considered.

In the present case plaintiff presented the testimony of Dr. Herbert Hamilton of Lafayette, Louisiana, an economist of considerable eminence in this area. It was his view that a fair discount rate at the time of trial was 8%, and that the growth rate of wages for oil field production workers such as Mr. Nesmith during the period from 1960 to 1978 was 6.21%. He also took into account pay raises which have been extended to wireline operators in plaintiff's old position from the time of his injury in March of 1978 until October, 1979, which indicated an increase of 21.85% over this comparatively short period of time, to calculate plaintiff's losses to date of trial. Considering the uncontradicted testimony of Dr. Hamilton, we conclude that the growth rate for wages based upon inflationary

factors for the next thirty years in the oil fields of Louisiana, will be approximately 6%.

This expert also projected plaintiff's income tax rate over the period in question to be approximately 15%. The total monetary losses calculated by Dr. Hamilton amount to \$822,325.57, less the present value of earnings over this period calculated at the prevailing minimum wage, \$150,296.44,³ or \$672,029.43.

We find, however, that Dr. Hamilton added an additional 30% of plaintiff's gross earnings for fringe benefits extended to Go Wireline employees, and that he also included an additional 17.16% of plaintiff's gross wages as the amount he would have earned as "bonus" pay under his employment contract. We do not find the evidence in this case sufficient to establish these two items by the required preponderance. The fringe benefits were taken by Dr. Hamilton from a brochure for prospective Go Wireline employees, chief among which is a profit sharing plan in which plaintiff did not participate, and no supporting evidence was offered to show the value of the remaining benefits, such as health insurance, the use of a company vehicle and credit card, etc., all matters easily proved.

The "bonus" pay added to plaintiff's wages is a varying percentage of the amount charged by his employer for those jobs undertaken by Nesmith. The 17.16% figure used by Dr. Hamilton was reached by deducting the total amount of his base pay from the gross income reported by him as earned during the year 1977. However, for the first three months of 1978, at a base salary of \$1,575.00 per

³ In arriving at this figure the increase in minimum wage was used, and an average annual increase since 1938 of 6.22% was employed. The discount rate of 8% was also used.

month, which was the same as his pay in 1978, he reported a gross income of \$6157.51, and, if the difference of \$1432.51 if to be considered as bonus pay, the percentage would be approximately 23%.

Accordingly, we use his average monthly earnings at the time of his accident, one-third of \$6,157.51, or \$2052.50 per month (\$24,630.00 per year) as the base upon which to predicate his losses. Our calculations are as follows:

1. Earnings lost to time of trial 2.1 years at \$24,630.00 per annum	\$ 51,723.00
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Future loss of earnings, discounted at 8% per annum and subject to a growth factor of 6% per annum, or a net discount rate of 2% over 31 years	<u>\$564,962.94</u>
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Total lost wages	\$616,685.94
Minus 15% income tax	<u>\$ 92,502.89</u>
	\$524,183.05

Less wages at minimum wage over the same period at the same discount rate	<u>\$151,302.72</u>
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TOTAL	\$372,880.33
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In addition to this sum, plaintiff is due an award for pain, suffering and mental anguish suffered by him in the past and that he will probably suffer in the future, plus past and future medical expenses.

By stipulation, the medical expenses were paid by intervenor, Employers National Insurance Company. These expenses amounted to \$8,390.77 to date of trial. Compensation has also been paid plaintiff at a daily rate of \$41.91.

Up to the date of trial these payments totaled \$38,150.70, and were continuing. Intervenor's lien on the recovery effected herein is recognized, and while we will add medical expenses to plaintiff's award there should be no mistake as to their payment.

Pain and suffering, mental anguish and discomfort, past and future, are difficult to value. Considering plaintiff's youth and his long life expectancy, and the restrictions his injury will impose upon his future activities in the recreational field, we believe an award of \$100,000.00 will adequately and fairly compensate him for these items of damages as well as any and all future medical expenses he may incur as a result of these injuries.

The final award, including Intervenor's claim for medical expenses, is accordingly calculated as follows:

Wages (from above)	\$372,880.33
Past medical expenses	8.390.77
Past and future pain, etc. and medical expenses	100,000.00
	<u>\$481,271.10⁴</u>

⁴ Calculated under the rule of *Johnson v. Penrod Drilling Co.*, supra, loss of future wages using the same base earning of \$24,600.00 per year discounted at 8% per annum would be \$279,210.00, which, with the other elements of loss and a deduction for present value of possible future earnings in a minimum wage job, would result in a total verdict of \$369,436.44, a difference of \$111,824.66 in amount in favor of plaintiff under our construction of *Norfolk & Western Railway Co. v. Liepelt, Administratrix*, supra. We are mindful of the fact that this interpretation of *Liepelt* may be erroneous, and *Johnson* may still bar the door to speculative damages as to factors other than income taxes in a case of future loss from personal injuries.

We next direct our attention to the question of prejudgment interest. In this case defendant Pool was operating on the fixed platform and its negligence through its crane operator, occurred on this man-made island to which the laws of Louisiana apply. Title 43 U.S.C.A. § 1333. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). On the other hand, the co-tortfeasor, Tidex, was operating the vessel JEWELL TIDE, and its liability for this accident is purely maritime in nature. Two cases, *Berry v. Sladco, Inc.*, 495 F.2d 523 (5 Cir. 1974) and *Aymond v. Texaco, Inc.*, 554 F.2d 206 (5 Cir. 1977) have unequivocally held that the provisions of Title 28 U.S.C.A. § 1961 govern the allowance of interest in these cases, there is no void in federal law, and that statute requires interest to run from date of entry of judgment, rather than from judicial demand as is the case under Louisiana law.

On the other hand, § 1961 has been interpreted as not prohibiting prejudgment interest in maritime cases, where its payment is left to the discretion of the trial judge; see: *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958 (5 Cir. 1969); *Canova v. Travelers Ins. Co.*, 406 F.2d 410 (5 Cir. 1969); *Doucet v. Wheless Drilling Co.*, 467 F.2d 336 (5 Cir. 1972) and *Howell v. Marmpegaso Compania Naviera*, 578 F.2d 86 (5 Cir. 1978) as examples of cases falling into this category.

Again, in cases arising under the Death on the High Seas Act, Title 46 U.S.C.A. § 761, et seq., it has been held that the widow's claim for pecuniary losses should bear interest from date of death in order to provide her fair and just compensation, *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5 Cir. 1959), but not for an unliquidated claim under the Jones Act, 46 U.S.C.A. § 688, for personal

injuries, where the losses extend into the future, *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5 Cir. 1972). Where the loss is a property loss, or when interest is to be allowed to "make the injured party whole" presents yet another category of cases. See, *West v. Harris*, 573 F.2d 873 (5 Cir. 1978), at 882, 883 and 884 for a full discussion of the problem.⁵

On balance, we feel that this case is not one where prejudgment interest should be allowed, and accordingly disallow this claim.

This leaves only the question of whether or not the cross-claim of Texaco against Tidex has any merit. The cross-claim of Tidex against that defendant was denied at the conclusion of the trial, and judgment was reserved on the claim of Texaco. A reading of the contract between Texaco and Tidex fails to disclose any express provision which would require Tidex to indemnify Texaco. Texaco was absolved from liability, and its defense was assumed by Pool Offshore during the trial under an express indemnity provision in the agreement between these two parties.

The claim of Texaco against Tidex is, therefore, denied.

Judgment is rendered accordingly. The parties shall

⁵ There appears to be a conflict in the interpretation placed upon 28 U.S.C.A. § 1961 by the court in *Berry v. Sladco*, *supra*, and *Aymond v. Texaco, Inc.*, *supra* (en banc), and *Illinois Central R.R. Co. v. Texas Eastern Transmission Corp.*, 5 Cir., 551 F.2d 943, and *West v. Harris*, *supra*. The matter properly addresses itself to the Congress. There is a need for *one* rule to be applied uniformly in all cases not covered by special statutory provisions, and § 1961 as it has been interpreted does not accomplish this.

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forthwith prepare a formal judgment in keeping herewith and forward it to the Court for signature. The Clerk is directed that no entry of judgment be made herein until such time as the formal decree is signed and filed.